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In The Supreme Court of the United States

OCTOBER TERM, 1994

FREEDOM RANCH, INC.,
Petitioner,

v.

BOARD OF ADJUSTMENT OF THE CITY OF TULSA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Appeals

BRIEF IN OPPOSITION

Alan L. Jackere
Assistant City Attorney
City of Tulsa
200 Civic Center, #316
Tulsa, OK 74103
(918) 596-7717

Attorney for Respondent
Board of Adjustment of
the City of Tulsa

Thomas P. Nally *
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
124 East Fourth St., Suite 400
Tulsa, OK 74103-5010
(918) 584-5182
*Counsel of Record

Roy D. Johnsen
Janine H. VanValkenburgh
Epperson & Johnsen
201 West Fifth St., Suite 440
Tulsa, OK 74103-4211
(918) 585-5641

Attorneys for Respondent
Twenty First Properties, Inc.

35 pp

QUESTIONS PRESENTED

The City of Tulsa's zoning ordinances provide that convict pre-release centers, adult detention centers and jails, together with various other uses, are permitted within the Central Business District of the City of Tulsa only upon the approval by the City of Tulsa Board of Adjustment, of an application to permit the particular use, at the specific location (referred to in the state enabling legislation and the Tulsa zoning ordinances as a "special exception"). The City of Tulsa's zoning ordinances also state that establishments that provide housing for individuals receiving drug and alcohol treatment and counseling services, and similar social services, are permitted within the Central Business District of the City of Tulsa, without the necessity of obtaining a special exception.

The questions presented in the case at bar are whether the Oklahoma Court of Appeals correctly decided that the City of Tulsa zoning ordinances that require a special exception to operate a convict pre-release center did not violate the Equal Protection Clause of the United States Constitution, are constitutionally firm on their face, and are constitutionally firm as applied to the convict pre-release center known as "Freedom Ranch," that is operated by the Petitioner, Freedom Ranch, Inc. ("Freedom Ranch").

STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Rule 29.1 of the Rules of this Court, Twenty First Properties, Inc. states that it has no parent company and no subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

STATEMENT AS TO AFFILIATED COMPANIES . (ii)

TABLE OF CONTENTS . . . . . (iii)

TABLE OF AUTHORITIES . . . . . (v)

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW 3

FACTS 5

A. The Nature of Freedom Ranch's Operation . . 5

(1) Freedom Ranch houses violent criminals 5

(2) Freedom Ranch's operation increases crime in the neighborhood 7

(3) Freedom Ranch's convict pre-release center (Use Unit 2) is different from uses included within Use Unit 5 8

B. The Issuance of the Zoning Clearance Permit 10

C. The Comprehensive Development Plan of the City of Tulsa 11

D. Board of Adjustment Action on Other Applications for Special Exceptions to Permit Convict Pre-release Centers 13

REASONS FOR DENYING THE WRIT 14

A. The Opinion of the Oklahoma Court of Appeals is in Accord with this Court's Decision in Cleburne 14

B. The Decisions of the United States Circuit Courts of Appeal are Consistent in their Application of the Principles of Cleburne . . 17

C. The Freedom Ranch Case would be Decided the Same in Both the Sixth and Eighth Circuits 22

D. There are No Special Reasons for this Court to Grant a Writ of Certiorari in this Case . . 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Application of Freedom Ranch, Inc.,
878 P.2d 380 (Okla. Ct. App. 1994) 4, 15, 16

Bannum, Inc. v. City of Fort Lauderdale,
901 F.2d 989 (11th Cir. 1990) 24

Bannum, Inc. v. City of Louisville, Ky.,
958 F.2d 1354 (6th Cir. 1992) 2, 17-19, 22-24

Bannum, Inc. v. City of St. Charles, Mo.,
2 F.3d 267 (8th Cir. 1993) 2, 17, 19, 20-22, 25

City of Cleburne, Tex. v. Cleburne Living
Center, 473 U.S. 432 (1985) . . . 2, 14-19, 20, 22, 24, 26-28

Gregory v. Ashcroft,
501 U.S. 452 (1991) 21

Village of Euclid, Ohio v. Ambler Realty
Co., 272 U.S. 365 (1926) 15

Ordinances

Tulsa, Ok., Rev. Ordinances ch. 16,
tit. 42, § 101.A 11

Treatises

Robert M. Anderson, *American Law of Zoning*, § 19.01 at 360 (2d ed. 1977) 25

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BRIEF IN OPPOSITION

Respondent Board of Adjustment of the City of Tulsa and Respondent Twenty First Properties, Inc. submit this joint brief in opposition to the Petition for Writ of Certiorari of Petitioner, and respectfully request that the Petition for Writ of Certiorari be denied.

SUMMARY OF ARGUMENT

Freedom Ranch asserts in its Petition for Writ of Certiorari that the Tulsa zoning ordinances which mandate that a convict pre-release center seek and obtain a special

exception are unconstitutional on their face, and are unconstitutional as applied to Freedom Ranch. Freedom Ranch relies on City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985), Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993), and Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354 (6th Cir. 1992), as authority for its position.

Respondents assert that none of the authority cited by Freedom Ranch holds that the ordinances in question were facially unconstitutional. To the contrary, each respective court applied the general rule that ". . . legislation is presumed to be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." Cleburne at 440.

In the case at bar, the Oklahoma Court of Appeals applied the authority set forth above and found the Tulsa zoning ordinances to be constitutional on their face and constitutional as applied to Freedom Ranch.

In general, zoning ordinances need not establish perfect classifications, nor predetermine all conceivable variations of general use classifications. There is a rational relationship to the public interest for zoning ordinances to require, upon notice and hearing, site specific review of proposed convict pre-release centers, which may have significant differences in the types of inmates housed, operations conducted, and locations proposed.

In the case at bar, Freedom Ranch commenced operations at the site in question, without the required special

exception: Freedom Ranch's inmates included violent offenders; Freedom Ranch's inmates committed crimes while housed at the facility; and the evidence presented to the Tulsa County District Court established that the Freedom Ranch convict pre-release center was injurious to the neighborhood, violated the spirit and intent of the Tulsa zoning ordinances, and would substantially interfere with achievement of the objectives of the Tulsa Comprehensive Development Plan.

Respondents assert, and the lower courts which have examined this matter concur, that the Tulsa zoning ordinances are constitutional on their face and constitutional as applied to Freedom Ranch.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW

The Tulsa zoning ordinances identify and group potential uses of property located within the City of Tulsa as "use units." The Tulsa zoning ordinances specify which use units are permitted by right, and which use units are permitted by special exception, in each of the zoning districts. A "transitional living center" is included within Use Unit 5. Had Freedom Ranch chosen to do so, its property could have been used as a transitional living center as a matter of right. However, Freedom Ranch's use of the subject property as a "convict pre-release center" (as a use included within Use Unit 2) requires the grant of a special exception by the Tulsa Board of Adjustment.

Freedom Ranch made application for, and was issued a zoning clearance permit as a transitional living center (Use

Unit 5). Thereafter, and contrary to the zoning clearance for Use Unit 5, Freedom Ranch operated a convict pre-release center (Use Unit 2) on the property. After a neighbor complained to the City of Tulsa, and after the City of Tulsa investigated the matter, the City of Tulsa zoning enforcement officer gave a notice of violation to Freedom Ranch. Freedom Ranch then appealed its notice of violation to the Tulsa Board of Adjustment, seeking a determination that it used the property as a transitional living center (included within Use Unit 5), or alternatively, that it should be granted a special exception to permit the use of the property as a convict pre-release center (Use Unit 2).

After notice and hearing, the Tulsa Board of Adjustment determined that Freedom Ranch's use of the property was, in fact, a convict pre-release center, and denied the application for special exception. Freedom Ranch then appealed the decisions of the Tulsa Board of Adjustment to the Tulsa County District Court, and after a trial de novo, the Tulsa County District Court affirmed the actions of the Tulsa Board of Adjustment. Freedom Ranch then appealed the decision of the Tulsa County District Court to the Oklahoma Court of Appeals.

The Oklahoma Court of Appeals, in the Application of Freedom Ranch, Inc., 878 P.2d 380 (Okla. Ct. App. 1994), found that under the facts of the case, the Tulsa zoning ordinances, and their application to Freedom Ranch, did not violate the Equal Protection Clause of the United States Constitution. As to the merits of Freedom Ranch's application for a special exception, which would allow its use of the property as a convict pre-release center, the Oklahoma

Court of Appeals held that the facts found by the Tulsa County District Court supported the denial of Freedom Ranch's application.[1]

On July 13, 1994, the Oklahoma Supreme Court denied Freedom Ranch's application for Writ of Certiorari to the Oklahoma Supreme Court.

FACTS

Freedom Ranch's recitation of the facts of the case at bar, set forth in its Petition to this Court for a Writ of Certiorari, omits important facts, and mischaracterizes other facts. The recitation should be corrected and supplemented as follows:

A. The Nature of Freedom Ranch's Operation

(1) Freedom Ranch houses violent criminals. The fact that the residents of Freedom Ranch are convicted felons, still serving their sentences of incarceration, cannot be disputed. Although Freedom Ranch repeatedly infers in its Petition for Writ of Certiorari that it houses only criminals convicted of nonviolent crimes, the evidence presented to the Tulsa County District Court established that the Freedom Ranch inmates include persons convicted of violent crimes. See infra p. 6-7.

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[1] Freedom Ranch has confined the issues presented in its Petition to this Court for Writ of Certiorari to the question of whether the Tulsa zoning ordinances violate the Equal Protection Clause.

Freedom Ranch has consistently chosen to use its own definition of "nonviolent," and such definition is misleading and different from that which is commonly intended and understood. For purposes of determining which convicts qualify for placement in pre-release centers, the Oklahoma Department of Corrections has established a "nonviolent offender" classification. Based upon the testimony presented to the Tulsa County District Court by Freedom Ranch's director, Mr. King, a "nonviolent offender" for the purposes of the Oklahoma Department of Corrections classification is a person who has had no write-ups, while in prison, for any violent incidents within the two years prior to his placement at the pre-release center. This classification has nothing to do with the nature of the crime that the inmate committed to result in his incarceration.

The Freedom Ranch director, Mr. King, testified before the Tulsa County District Court as follows:

> Q. (On cross examination) In any event, when you say that, you're not certifying to the Court are you, sir, that as we stand here and you sit there today that there's not a violent offender down there at Freedom Ranch, are you?
>
> A. (by Mr. King) No, sir.

Q. Couldn't there be?

A. You bet.

(Tr. Vol. II, 92).

The facts established that Freedom Ranch inmates include persons convicted of robbery, burglary, second degree rape and grand larceny. (Tr. Vol. II, 91). Freedom Ranch's repeated assertions in its Petition for Writ of Certiorari that its facility is a center for nonviolent offenders misstates the record.

(2) Freedom Ranch's operation increases crime in the neighborhood. Throughout these proceedings, Freedom Ranch has attempted to persuade the Court that its operation has no negative impact on crime in its neighborhood. The evidence presented to the Tulsa County District Court, however, does not support Freedom Ranch's assertion.

Freedom Ranch relies on the testimony of a police department witness that Freedom Ranch has not posed any problem in the area with respect to crime. But such conclusion is based upon that witness's examination of calls from Freedom Ranch. It should be noted there is little need for Freedom Ranch to call the Tulsa Police Department to report the behavior of its inmates, since Freedom Ranch is required to report such behavior directly to the Tulsa Community Corrections Center, that is operated by the Oklahoma Department of Corrections. The Tulsa Community Corrections Center is a lock-up facility.

A more accurate measure of the behavior of Freedom Ranch inmates is reflected in the "serious incident reports," filed by Freedom Ranch with the Oklahoma Department of Corrections. For an eight month period in 1991, seventeen (17) such reports were filed, involving 18% of the Freedom Ranch population. This number included reports of escape (6), assault and battery (2), shoplifting (2), and possession of a stolen vehicle (1), among others. (Tr. Vol. II, 60-61).

It should also be noted that whatever the source of calls made to the Tulsa Police Department from the Freedom Ranch neighborhood, the volume of calls is heavy and represents a great deal of police activity in the neighborhood. (Tr. Vol. III, 546, 550).

(3) Freedom Ranch's convict pre-release center (Use Unit 2) is different from uses included within Use Unit 5. Basic to Freedom Ranch's argument in this case is its contention that its operation is similar to a transitional living center, and other group home uses included within Use Unit 5, and permitted by right within the Tulsa Central Business District.[2] Respondents respectfully submit that both the

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[2] The Tulsa zoning ordinances define a transitional living center to be as follows:

> Transitional Living Center: A community-based residential facility that provides short-term (120 days or less) room and board in a supervised living environment utilizing counseling and rehabilitation services for persons with a history of juvenile delinquency, behavioral disorders, mental illness, alcoholism or drug abuse.

Tulsa Board of Adjustment and the Tulsa County District Court found that Freedom Ranch's convict pre-release center is not a transitional living center. Respondents further submit that the City of Tulsa is within its legislative prerogatives to make the distinction in its zoning ordinances between the different uses of property occasioned by a convict pre-release center and a transitional living center, and to require the issuance of a special exception in the case of a convict pre-release center.

The Freedom Ranch facility consists of 20 efficiency apartment units, twelve of which are used for inmate housing. The present capacity of the Freedom Ranch facility is 60 inmates, but Freedom Ranch has plans to expand its facility to a capacity of 84. Each existing unit contains only 385 square feet. (Tr. Vol. II, 73, 74, 98, 226-227; Tr. Vol. V, 154).

Freedom Ranch's inmates are under 24 hour a day alert supervision. Unauthorized absences are to be reported to the Oklahoma Department of Corrections, and are treated as escapes from a penal institution, subject to criminal prosecution. (Tr. Vol. II, 138, 140-141). In addition to housing inmates, Freedom Ranch conducts, on premise, 500 urine tests a month for nonresident persons who are under the supervision of the United States Probation Office. (Tr. Vol. II, 77-78).

While there may be some similarities between a transitional living center and a convict pre-release center (occupants of a transitional living center customarily have drug or alcohol problems, and some of the inmates at a

convict pre-release center may also have drug or alcohol problems), the evidence presented to the Tulsa County District Court established that the only requirement that a person must meet to become an inmate at a convict pre-release center is that he be a convicted felon. Commission of a violent crime would not disqualify a man from becoming an inmate at the convict pre-release center. (Tr. Vol. II, 56, 89-91).

B. The Issuance of the Zoning Clearance Permit

Freedom Ranch would have this Court believe that it was misled by the City of Tulsa when the City of Tulsa initially issued an occupancy permit to Freedom Ranch as a Use Unit 5 classification. Respondents respectfully submit that Freedom Ranch's application for an occupancy permit, based upon a Use Unit 5 classification, was not innocent. Before making the Use Unit 5 application, Freedom Ranch's director, Mr. King, filed an application with the City of Tulsa, seeking a special exception for a convict pre-release center (Use Unit 2), with regard to a different property. Mr. King's prior application, however, was denied by the City of Tulsa. (Tr. Vol. II, 124-125, 135).

Freedom Ranch also asserts that the City of Tulsa was aware of the nature of the Freedom Ranch operation from its inception. The City of Tulsa zoning clearance officer, who testified before the Tulsa County District Court, established that had Freedom Ranch made a fair disclosure of the nature of its intended use of the property, a Use Unit 5 permit

would not have been issued to Freedom Ranch. (Tr. Vol. IV, 23-27).

C. The Comprehensive Development Plan of the City of Tulsa

Tulsa zoning ordinances mandate that special exceptions will be granted by the Tulsa Board of Adjustment only after a determination that, among other requirements, the proposed use will be in harmony with the spirit and intent of the Tulsa zoning ordinances.

The spirit and intent of the Tulsa zoning ordinances are embodied in Tulsa, Ok., Rev. Ordinances ch. 16, tit. 42, § 101.A, and states as follows:

> This code is enacted for the purposes of promoting the . . . general welfare . . . conserving the value of buildings and encouraging the most appropriate use of land; encouraging the industrial, commercial and residential growth of the community; and promoting the development of the community in accordance with a comprehensive plan. (emphasis added).

Under the Tulsa Comprehensive Development Plan, the subject property is located in Development Opportunity Site 3, and is the area within the Central Business District of the City of Tulsa with the greatest redevelopment potential. The Tulsa Comprehensive Development Plan for

Development Opportunity Site 3 anticipates redevelopment of the area with office and residential uses.

Testimony regarding planning and zoning practice was presented to the Tulsa County District Court by a number of exceptionally well-qualified professionals. The testimony was consistent, well reasoned, and established in substance the following facts:

The City of Tulsa has a major investment in the downtown area, including major urban renewal projects, expressway systems, its civic center facility, and various government facilities. The vitality and redevelopment of the downtown Tulsa area are essential to the social and economic health of the City. (Tr. Vol. IV, 120-123, 198, 239; Vol. V, 7, 239).

The Cathedral Square Area and particularly Development Opportunity Site 3, in which the Freedom Ranch property is located, is the gateway from the southern part of the City of Tulsa to the downtown area, and has significant redevelopment potential. (Tr. Vol. IV, 119, 124, 197, 204; Vol. V, 232-234).

Freedom Ranch's convict pre-release center is injurious to the neighborhood. (Tr. Vol. IV, 132, 217; Vol. V, 16, 241).[3]

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[3] This evidence is in direct contrast to Freedom Ranch's assertion in its Petition for Writ of Certiorari that it has improved the area in which it is located.

The use of the subject property by Freedom Ranch as a convict pre-release center is not in keeping with the spirit and intent of the Tulsa zoning ordinances. The use of the subject property as a convict pre-release center would frustrate the objectives of the Tulsa Comprehensive Development Plan, and would impair the future redevelopment of an area which is prime for redevelopment and has a substantial potential for downtown revitalization.

Freedom Ranch's operation results in a diminution of property values in the neighborhood, and negatively affects the potential for the redevelopment of neighboring properties. (Tr. Vol. V, 61, 62, 100, 101, 154-156, 160, 161).

Even Freedom Ranch's own appraisal witness, Mr. Terry Ingram, testified that he could not, from comparable sales, identify any trend (up, down, or neutral) of property values in the vicinity of Freedom Ranch (Tr. Vol. II, 315), and, in effect, had no opinion as to whether Freedom Ranch would negatively impact future redevelopment of the area. Mr. Ingram did admit, however, that Freedom Ranch "could" negatively impact the value of adjoining property, if such property were intended to be redeveloped as an apartment project. (Tr. Vol. III, 329).

D. Board of Adjustment Action on Other Applications for Special Exceptions to Permit Convict Pre-release Centers

In its Petition for Writ of Certiorari, Freedom Ranch points to testimony of Mr. Robert Gardner (a Tulsa city land use planner), to the effect that the Tulsa Board of Adjustment

has never approved a special exception for a convict pre-release center. While the citation to the testimony is accurate, reference to it at this time misleads the Court. In fact, the City of Tulsa, within the past year, has approved two different applications for special exception to permit the operation of two (2) separate convict pre-release centers, one containing 285 beds and a second containing 35 beds.

REASONS FOR DENYING THE WRIT

A. The Opinion of the Oklahoma Court of Appeals is in Accord with this Court's Decision in Cleburne

The decision of the Oklahoma Court of Appeals in this case is in keeping with this Court's holding in Cleburne, supra. In Cleburne, the operator of a group home for the mentally retarded applied for and was denied a special use permit by the City of Cleburne. The operator argued that the city's ordinances requiring a special use permit were invalid on their face, and were invalid as applied, because they discriminated against the mentally retarded in violation of their rights under the Equal Protection Clause.

In its analysis of the case, this Court in Cleburne cited the general rule that ". . . legislation is presumed to be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." Cleburne, 473 U.S. 440. Further, this Court stated that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows states wide latitude . . ., and the Constitution

presumes that even improvident decisions will eventually be rectified by the democratic processes." Cleburne at 440.

This Court in Cleburne also held that mental retardation is not a quasi-suspect classification, calling for a more exacting standard of judicial review than the "rational relationship standard," which is normally accorded economic and social legislation. Id. at 442. Searching the district court record for the rational relationship between the requirement of a special use permit for a home for the mentally retarded, and a legitimate interest of the city, this Court in Cleburne found no supporting facts. Accordingly, this Court held in Cleburne that the city ordinances as applied failed the "rational relationship" test, and were invalid as applied.

The decision of the Oklahoma Court of Appeals in the case at bar is in accord with the Cleburne decision. The Oklahoma Court of Appeals began its analysis with the proposition that municipal zoning ordinances and regulations are presumed valid, citing Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). Secondly, the court acknowledged that ". . . so long as such zoning ordinances create classifications based not upon a suspect class nor involving fundamental right, such classification need only rationally relate to a legitimate purpose in order to withstand constitutional challenge." Freedom Ranch, 878 P.2d at 382.

Next, the Oklahoma Court of Appeals considered whether the Tulsa zoning ordinances in question create a classification that is based upon a suspect class, or involve a fundamental right, thereby falling outside the purview of the

the general rule. The Oklahoma Court of Appeals concluded as follows:

> . . . In the present case, we deal with neither a suspect class (convict pre-release centers) nor a fundamental right (to operate a convict pre-release center without regard to zoning ordinances). Thus, if there exists a legitimate purpose for requiring convict pre-release centers to obtain a special zoning exception, such treatment is constitutional.

Freedom Ranch at 382.

Finally, and in accord with the decision of this Court in Cleburne, the Oklahoma Court of Appeals reviewed the record to determine whether the City of Tulsa demonstrated that a rational relationship existed between its legitimate city interest and the requirement that a special use permit be obtained for a convict pre-release center.

The Oklahoma Court of Appeals held that the City of Tulsa's denial of Freedom Ranch's application for a special use permit was rationally related to the City's legitimate interest. Id. at 382. The Oklahoma Court of Appeals noted that the evidence submitted at trial (which established that Freedom Ranch housed violent criminals, increased crime in the neighborhood, diminished neighborhood property values and precluded the accomplishment of the City's Comprehensive Development Plan) required the conclusion that the Tulsa zoning ordinances, and their application to Freedom Ranch, are constitutional. Id.

B. The Decisions of the United States Circuit Courts of Appeal are Consistent in their Application of the Principles of Cleburne

Freedom Ranch asserts that because two United States Circuit Courts of Appeal have reached different conclusions regarding the constitutionality of the ordinances that they reviewed, "the Courts of Appeal are divided concerning the application to halfway houses of this Court's analysis in Cleburne."

Respondents respectfully disagree with Freedom Ranch's assertions. The circuit courts in both Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354 (6th Cir. 1992), and Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993), analyzed the facts presented in light of the Cleburne ruling. Consistent with its analysis of Cleburne, the court in Louisville held that the ordinances were unconstitutional as applied, while the court in St. Charles found that the ordinances were constitutional as applied to the case presented for review. Neither court however, held that the ordinances in question were facially unconstitutional.

In Louisville city zoning ordinances required a conditional use permit for community treatment centers for felony offenders. No conditional use permit was required for boarding houses or certain other types of group homes. Bannum proposed to operate a community treatment center, housing 24 persons not convicted of crimes of violence. Rather than apply for a conditional use permit, Bannum brought an action against the city in federal district court,

alleging that the ordinances treated its operations differently from other group homes, and were therefore unconstitutional.

In accord with this Court's analysis in Cleburne, the federal district court, and subsequently the United States Court of Appeals for the Sixth Circuit, reasoned that there must be a rational relationship between the different treatment afforded by the ordinances, and a legitimate state interest, in order for the ordinances to pass constitutional muster. In Louisville, the city presented one primary justification for the different treatment afforded the community training center: such centers present a threat to the community in which they operate, because their residents are more likely to commit crimes than are persons who have never been convicted of a crime.

Searching the trial court record, the United States Court of Appeals for the Sixth Circuit found no evidence to support the city's position. Finding that the city failed to establish the required rational relationship, the Sixth Circuit held that the Louisville ordinances were unconstitutional only as applied to the plaintiff. Louisville, 958 F.2d at 1361. Notably, the court went on to say that it was not necessary for the court to declare the ordinances invalid, as the city may well have a legitimate interest in requiring a conditional use permit for an institution housing those with a prior record of violent offenses. Id. at 1361. The court also declined to hold that the city could never require a conditional use permit for group home uses, by stating:

> As the district court recognized in its January 1989 ruling, the City may well have a

> legitimate interest in requiring a conditional use permit of an institution housing those with a prior record of violent felony offenses. We do not hold that the City may never require a conditional use permit for group home uses.

Id.

The posture of the Louisville case as presented to the Sixth Circuit is noteworthy. The federal district court had found, based upon the evidence presented at trial, that the ordinances were unconstitutional as applied to the plaintiff. The circuit court's review was limited to a determination of whether the trial court had clearly erred in its decision.

The United States Court of Appeals for the Eighth Circuit in St. Charles scrutinized the ordinances in question, in light of this Court's holding in Cleburne. The case of St. Charles, however, came to the United States Court of Appeals for the Eighth Circuit in a different posture from that of Louisville. In St. Charles, the federal district court had held the zoning ordinances constitutional as applied.

The zoning ordinances in the St. Charles case required "half-way houses" (facilities for rehabilitation of prisoners, former prisoners, or juvenile offenders) to obtain conditional use permits from the city, while hotels, convalescent homes, hospitals, apartment buildings and multiple family housing units were permitted as a matter of right in certain zoning districts. Again, rather than apply for a conditional use permit for its community treatment center, the plaintiff filed a complaint against the city in federal district court. The

plaintiff claimed that the city violated its rights under the Equal Protection Clause of the Constitution by requiring it to apply for a permit, while not requiring other group homes to make such an application.

Applying the rational relationship test utilized in Cleburne, the United States Court of Appeals for the Eighth Circuit found that the St. Charles' ordinances which required conditional use permits for half-way houses were rationally related to the legitimate state interest of the safety and welfare of its public. St. Charles, 2 F.3d at 272-73. Because half-way houses, as defined by the ordinances, could include facilities for persons convicted of violent crimes or rape, the city had a legitimate interest in controlling the location of such facilities to promote the public welfare. Id. at 272-73.

The United States Court of Appeals for the Eighth Circuit reasoned that the concerns of the city under the circumstances of Cleburne were different from the concerns in St. Charles. The city's requirements in Cleburne would be irrational as applied to any home for the mentally retarded, whereas in St. Charles, the classification contained in the ordinances was addressed to half-way houses which could serve violent offenders. The Court went on to state as follows:

> . . .The City could rationally believe that some groups in this classification could pose a threat to the public welfare. Such concerns are not based on irrational prejudice, but rather on a realistic view that some members of these groups could pose a threat in some locations.

> It is not irrational for the City to believe that recidivism could be a problem with some person served by half-way houses. This is a legitimate concern which can be addressed on a case-by-case basis through application for conditional permits.

Id. at 272.

Finding that a rational relationship existed between the requirement of a conditional use permit for the operation of a half-way house, and the legitimate state concerns for public welfare, the United States Court of Appeals for the Eighth Circuit held in St. Charles that the ordinances were constitutionally firm on their face. Id. at 271. The appellate court further found that it was not arbitrary or irrational for the city to create a broad category ("half-way houses") in its ordinances, and then draw fine lines between different types of half-way houses when an application for a permit is submitted. Id. at 273. The Eighth Circuit concluded that the ordinances were constitutional as applied. Id.[4] The circuit court left to the regulatory body the job of scrutinizing the

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[4] The Eighth Circuit cites this Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), stating that the city does not violate the Equal Protection Clause just because the classifications contained in its ordinances are not perfect. The zoning ordinance, the Court states, was not drafted just to apply to the application under consideration, but to any halfway house which houses prisoners, former prisoners or juvenile offenders. The same can be said of the Tulsa ordinances, which create broad categories allowing for distinctions to be made in connection with each application.

particular facts of the application, and the propriety of a particular location.

In summary, the courts in both Louisville and St. Charles followed this Court's analysis in Cleburne. Each court confirmed the decision presented for review. Neither court concluded that the ordinances under review were facially unconstitutional. Each court recognized that state interests may be advanced by requiring conditional use permits for facilities housing persons convicted of violent crimes. The decisions are not inconsistent with each other, and are not inconsistent with this Court's ruling in Cleburne.

C. The Freedom Ranch Case would be Decided the Same in Both the Sixth and Eighth Circuits

Freedom Ranch claims, "[t]here can be no doubt that the present case would have been decided the opposite way if it had come before the Sixth Circuit." (Page 10 of its Petition to this Court for a Writ of Certiorari). Respondents respectfully disagree.

In the Louisville case, there was no evidence presented with regard to the effect that the proposed community treatment center would have on the value of neighboring properties. In addition, there was no evidence presented with regard to the impact that the proposed use would have on achieving the objective of a comprehensive development plan. In the instant case, credible evidence was submitted concerning the decline in the value of neighboring properties, and the negative impact that the existence of

Freedom Ranch would have on the accomplishment of Tulsa's Comprehensive Development Plan.

Further, the proposed community treatment center in Louisville did not house felons convicted of crimes of violence, crimes involving firearms or sexual offenders. The evidence presented in the instant case clearly distinguishes from Louisville that Freedom Ranch's population did include inmates convicted of crimes involving robbery, burglary, second degree rape and grand larceny. The evidence also showed that, while residing at Freedom Ranch, inmates continued to commit crimes. During an eight month period for which statistics were available, nearly 20% of the Freedom Ranch population was involved in incidents sufficiently serious to report the occurrences to the Oklahoma Department of Corrections. With that track record, one can only wonder what the future holds if some form of zoning review is not required.

The United States Court of Appeals for the Sixth Circuit in Louisville did not find the Louisville ordinances that required a conditional use permit invalid on their face. Rather, the court found as follows:

> As the district court recognized in its January 1989 ruling, the City may well have a legitimate interest in requiring a conditional use permit of an institution housing those with a prior record of violent felony offenses. We

> do not hold that the City may never require a conditional use permit for group home uses.

Louisville, 958 F.2d at 1361.

Contrary to Freedom Ranch's argument, it is respectfully submitted that both the Sixth and Eighth Circuits would find, based on the facts of this case, that a conditional use permit requirement for the Freedom Ranch operation does not violate the Equal Protection Clause.[5]

D. There are No Special Reasons for this Court to Grant a Writ of Certiorari in this Case.

Special exception procedures are an accepted and well established part of zoning administration. Special exception procedures are designed to provide practical flexibility, to control land uses which are especially troublesome, and to soften the impact of certain uses upon areas where they will be incompatible unless conditioned in a manner suitable to a

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[5] Freedom Ranch refers to the Eleventh Circuit case of Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990). Because of the posture of the case, the circuit court did not rule on the constitutionality of the zoning ordinances under review. The case was remanded to the federal district court for determination of the constitutional validity of the ordinances, with the recommendation that the district court's decision include an analysis of Cleburne. It is interesting to note that the residents of the treatment center in the Fort Lauderdale case were men convicted of white collar crime. Freedom Ranch's conclusion that the case at bar would be decided differently in the Eleventh Circuit is not supportable.

particular location. Robert M. Anderson, *American Law of Zoning*, § 19.01 at 360 (2d ed. 1977).

By means of the special exception process, a use which would ordinarily fall within a broadly defined category (residential, commercial, industrial) but which has characteristics that may be incompatible with some uses of such classifications, may be maintained in certain other districts, pursuant to a special exception permit approved by the Board of Adjustment after notice, hearing and compliance with prescribed standards. Anderson, § 19.01 at 359.

It is a rational exercise of legislative authority for the City of Tulsa to find that convict pre-release centers, as well as jails, cemeteries, bus stations, post offices and other nontypical uses, should be subject to special exception review by the Tulsa Board of Adjustment, and that the Tulsa zoning ordinances establish the standards to be met in order for the Tulsa Board of Adjustment to approve the special exception use.

Similarly, the City of Tulsa may legislatively determine that transitional living centers should be classified in a different category from convict pre-release centers, and that the particular characteristics of a transitional living center would not require that a special exception requirement be imposed. The City of Tulsa does not violate the Equal Protection Clause just because the classifications contained in the Tulsa zoning ordinances are not perfect. As stated by the court in St. Charles, ". . . we need inquire only whether 'any state of facts reasonably may be conceived to justify' the

classification of half-way houses as conditional uses. . . ." (citation omitted).

As social circumstances change, and as various types of land use evolve to meet social needs, a zoning ordinance may need to be amended to deal with such uses, the scale and nature of which may not have been previously foreseen. This is what actually occurred in the City of Tulsa, following the completion of the Freedom Ranch proceeding. After the completion of the Freedom Ranch proceeding, the Tulsa zoning ordinances were amended to require that even a transitional living center must seek a special exception permit. The amendment does not establish that the previous ordinance was unconstitutional, or that a transitional living center is the same as a convict pre-release center, but rather confirms that the City of Tulsa has the ability to exercise its legislative prerogatives, and to more effectively regulate the uses of property within the limits of the City. The amendment also confirms that neither a convict pre-release center nor a transitional living center are necessarily an appropriate use at all locations within the Central Business District of the City of Tulsa.

Freedom Ranch raised its constitutional challenge to the Tulsa zoning ordinances early in this proceeding. Both the Tulsa County District Court and the Oklahoma Court of Appeals have carefully analyzed the legal precedents, including the Cleburne decision, to measure the Tulsa zoning ordinances against such precedent. Both courts have examined the evidence concerning the true nature of Freedom Ranch's operation and effect. Both courts have found that the City of Tulsa had a legitimate interest which was

rationally related to the requirement that Freedom Ranch apply for and receive a special exception for the operation of a convict pre-release center in the Central Business District of the City of Tulsa. Both courts have found that the City of Tulsa's denial of the special exception is supported by the facts of this case.

The procedures established by the Tulsa zoning ordinances, together with the established legal precedent, are sufficient guidance for the selection of appropriate sites within the Tulsa community for the location of convict pre-release centers.

The overcrowded nature of the nation's prisons and the possible use of convict pre-release centers to relieve such overcrowding, is not a sufficient reason to grant certiorari in this case. Municipal zoning authorities, guided by the legal precedent of Cleburne and related decisions, should be permitted to formulate ordinances that protect the public interest and provide a practical means for the regulation and location of convict pre-release centers and similar uses.

CONCLUSION

Further review of this case is not warranted. The decisions of the circuit courts of appeal are consistent with the Cleburne decision. The Oklahoma Court of Appeals was correct with regard to its analysis of the constitutional validity of the Tulsa zoning ordinances, and the principles set

forth in Cleburne. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

Alan L. Jackere
Assistant City Attorney
City of Tulsa
200 Civic Center, #316
Tulsa, OK 74103
(918) 596-7717

Attorney for Respondent
Board of Adjustment of
the City of Tulsa

Thomas P. Nally *
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
124 East Fourth St., Suite 400
Tulsa, OK 74103-5010
(918) 584-5182
*Counsel of Record

Roy D. Johnsen
Janine H. VanValkenburgh
Epperson & Johnsen
201 West Fifth St., Suite 440
Tulsa, OK 74103-4211
(918) 585-5641

Attorneys for Respondent
Twenty First Properties, Inc.